

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN MONTUE,

Petitioner, No. CIV S-05-0935 LKK JFM P

vs.

TERESA A. SCHWARTZ, et al.,

Respondents. ORDER

Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of this court's August 11, 2005 dismissal of his application for a writ of habeas corpus for failure to obtain authorization from the United States Court of Appeals for the Ninth Circuit to proceed with a second or successive habeas corpus petition. See 28 U.S.C. § 2244(b)(3). Petitioner has also requested an extension of time to file a request for a certificate of appealability pursuant to 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The court must either issue a certificate of appealability indicating which issues satisfy the required showing or must state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b).

1 Where, as here, the petition was dismissed on procedural grounds, a certificate of
2 appealability “should issue if the prisoner can show: (1) ‘that jurists of reason would find it
3 debatable whether the district court was correct in its procedural ruling’; and (2) ‘that jurists of
4 reason would find it debatable whether the petition states a valid claim of the denial of a
5 constitutional right.’” Morris v. Woodford, 229 F.3d 775, 780 (9th Cir. 2000) (quoting Slack v.
6 McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 1604 (2000)).

7 After careful review of the entire record herein, this court finds that petitioner has
8 not satisfied the first requirement for issuance of a certificate of appealability in this case.
9 Specifically, there is no showing that jurists of reason would find it debatable whether petitioner
10 was required to, and did not, first obtain authorization from the court of appeals to proceed with
11 this second or successive habeas corpus application. Accordingly, a certificate of appealability
12 should not issue in this action.

In accordance with the above, IT IS HEREBY ORDERED that:

1. A certificate of appealability should not issue in this action;
2. Petitioner's August 29, 2005 request for an extension of time is denied as and
3. The Clerk of the Court is directed to process petitioner's appeal to the United

DATED: September 12, 2005

/s/Lawrence K. Karlton
UNITED STATES DISTRICT JUDGE

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